IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

PETITIONER'S BRIEF

ALAN C. RASSNER
Counsel of Record for Petitioner
15 Park Row
New York, N.Y. 10038
(212) 227-2618

SHAFTER & SHAFTER
Attorneys for Petitioner

RASSNER, RASSNER & OLMAN
Of Counsel for Petitioner

DICK BAILEY SERVICE, INC., P.O. Box X, S.I., N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

NOTE

Pursuant to order of this Court dated June 18, 1979, the printing of an appendix has been dispensed with.

The opinions of the Circuit and District Courts, as well as the judgment to be reviewed are printed in an appendix to the Petition for a Writ of Certiorari. References in the brief designated (A.) are to this appendix.

CASES CITED

STATUTES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

-against-

LIBERTY MUTUAL INSURANCE COMPANY, as subrogee of CONNECTICUT TERMINAL COMPANY,

Repondent.

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 586 F.2d 908. The opinion of the District Court is reported at 448 F. Supp. 652.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). A petition for a writ of certiorari was granted by order of this Court dated May 14, 1979.

STATUTES WHICH THE CASE INVOLVES

33 U.S.C. §905. Exclusiveness of Liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Mar. 4, 1927, c. 509, §5, 44 Stat. 1426; Oct. 27, 1972, Pub. L. 92-576, §18(a), 86 Stat. 1263.

33 U.S.C. §933. Compensation for Injuries Where Third Persons are Liable

Election of Remedies

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Acceptance of Compensation Operating as Assignment

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Payment Into Section 944 Fund Operating as Assignment

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

Institution of Proceedings or Compromise by Assignee

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

Recoveries by Assignee

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

Institution of Proceedings by Person Entitled to Compensation

(f) If the person entitled to compensation institutes proceedings within the period described in subdivision (b) of this section the employer shall be required to pay as compensation

under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

Compromise Obtained by Person Entitled to Compensation

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

Subrogation

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Right to Compensation as Exclusive Remedy

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

Mar. 4, 1927, c. 509, §33, 44 Stat. 1440; June 25, 1938, c. 568, §§12, 13, 52 Stat. 1168; Aug. 18, 1959, Pub. L. 86-171, 73 Stat. 391; Oct. 27, 1972, Pub. L. 92-576, §15(f)-(h), 86 Stat. 1262.

QUESTION PRESENTED FOR REVIEW

When a longshoreman's suit against a shipowner results in a recovery exceeding the workmen's compensation lien, does the stevedore-employer (or compensation insurance carrier) recover its entire lien from the longshoreman's recovery, or must it share proportionately in the longshoreman's costs of obtaining that recovery, including attorney's fees?

STATEMENT OF THE CASE

This action was originally brought to recover damages for personal injuries sustained by petitioner on August 9, 1973 while working as a longshoreman aboard a vessel owned and operated by C. Y. TUNG and ECKERT OVERSEAS AGENCY, INC.[1] Jurisdiction was based on diversity of citizenship (28 U.S.C. §1332). (R. 1, 11)

Petitioner was paid compensation benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §901 et seq.), by respondent, Liberty Mutual Insurance Company, the workmen's compensation insurance carrier for Connecticut Terminal Company, petitioner's employer. These benefits, including both disability payments and medical expenses, amounted to $17,152.83. (R. 19)

Counsel for petitioner and the shipowner agreed to a settlement of the action in the amount of $60,000, and while they were waiting for approval from their respective clients, Liberty

1. These parties were named as defendants in the District Court. They have no interest in the outcome of this proceeding and have not been named as parties pursuant to Rule 21 (4) of the Rules of this Court.

Mutual Insurance Company requested permission from the District Court to intervene, which was granted. (R. 19,21)

Following approval of the settlement by both the petitioner and the shipowner, the petitioner moved for summary judgment on the intervenor's action for an order directing that the lien of Liberty Mutual Insurance Company for workman's compensation benefits be fixed in an amount so that it will bear proportionately with petitioner the costs of obtaining petitioner's recovery from the shipowner, including petitioner's attorney's fees. (R. 24)

This motion was denied (A. 14)[2] and judgment was entered directing that the longshoreman's attorney's fees be awarded first from the sum recovered upon settlement with the shipowner, and that the intervenor be reimbursed in full for the compensation lien it holds (R. 32).[3]

2. Pursuant to order of this Court dated June 18, 1979, the printing of an appendix has been dispensed with.

The opinions of the Circuit and District Courts, as well as the judgment to be reviewed are printed in an appendix to the Petition for a Writ of Certiorari. References in the brief designated (A.) are to this appendix.

3. The distribution of the $60,000 pursuant to the lower Court's judgment was as follows: (R. 24)

Recovery	$60,000.00
less expenses	(202.80)
balance for distribution	$59,797.20
less fee of one-third	(19,932.40)
balance	$39,864.80
less entire lien of Liberty Mutual	(17,152.83)
net to Mr. Bloomer	$22,152.83

An appeal was taken from that part of the judgment which directed that the intervenor be reimbursed in full (R. 33). The Circuit Court affirmed (A. 1).[4]

4. Had petitioner prevailed and Liberty Mutual Insurance Company been required to share proportionately with petitioner his cost of obtaining the recovery, the $60,000 would be distributed as follows: (R. 24)

Recovery		$60,000.00
less expenses		(202.80)
balance for distribution		$59,797.20
less fee of one-third		(19,932.40)
balance		$39,864.80
entire lien of Liberty Mutual	$17,152.83	
less proportionate share of fees and expenses (.3355866 $17,152.83)*	(5,756.26)	
	$11,396.57	(11,396.57)
net to Mr. Bloomer		$28,468.23

*Expenses of litigation amounted to $202.80, and counsel fees were $19,932.40. Total cost to petitioner, therefore, of recovering $60,000 amounted to $20,135.20, or 33.55866% of the amount recovered.

ARGUMENT

WHEN A LONGSHOREMAN'S SUIT AGAINST A SHIPOWNER RESULTS IN A RECOVERY EXCEEDING THE WORKMAN'S COMPENSATION LIEN, THE LIEN HOLDER SHOULD SHARE PROPORTIONATELY IN THE LONGSHOREMAN'S COSTS OF OBTAINING THE RECOVERY, INCLUDING COUNSEL FEES.

Background

Longshoremen injured on board vessels in the course of their employment receive benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.

Pursuant to 33 U.S.C. §905(b), when the longshoreman is injured as a result of negligence of the vessel's owner, he may bring a third-party action. However, the employer of the longshoreman (or its workmens' compensation insurance carrier) has a lien on the proceeds of the recovery in the third-party action.

If the longshoreman should fail to bring the action against a responsible shipowner within six (6) months after a compensation award, the employer may bring such action (33 U.S.C. §933(b)).

Although experience has revealed that these actions are seldom, if ever, brought by stevedore employers as they hesitate to sue shipowners with whom they do business,[5] Congress has clearly set forth in 33 U.S.C. §933(e) how the proceeds of these actions should be disbursed. The statute, however, does not set forth the manner of distribution of the recovery when suit is

5. See: *Valentino v Rickners Rhederei, G.M.B.H. etc.*, 552 F.2d 466, at 469 (2nd Cir. 1977)

brought by the longshoreman himself, and the Courts have been required to fill this void.[6]

Prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., when a longshoreman brought a third-party action against a vessel owner, the shipowner would almost routinely implead the stevedore (the longshoreman's employer) claiming a breach of warranty of workmanlike performance which was express or implied in the stevedoring contract. *Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

As a result, the longshoreman's suit against the shipowner was defended by both the shipowner and the stevedore. If the longshoreman prevailed, in many instances the shipowner would receive indemnity from the stevedore and, in effect, the longshoreman's rcovery would come from the stevedore's pocket.

The longshoreman and the stevedore, obviously, had adverse interests. This resulted in decisions such as *Russo v. Flota Mercante Grancolombiana,* 303 F. Supp. 1404 (SDNY 1969) and *Ballwanz v. Jarka Corporation of Baltimore,* 382 F.2d 433 (4th Cir. 1967), which denied any fee to the longshoreman's counsel out of the compensation lien on the basis that to do so would be to charge the stevedore with expenses and legal fees incurred by plaintiff in a law suit resulting in a judgment which the stevedore was ultimately required to pay.

6. The statute does not provide that the employer (or its compensation insurance carrier) have a lien on the proceeds of the third-party action, but all Courts who have ruled on the subject are in agreement, for equitable reasons or otherwise, that the lien exists.

The 1972 Amendments and Their Effect

With the advent of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, the employer/stevedore was no longer required to indemnify the shipowner for a judgment in favor of the longshoreman (33 U.S.C. §905 (b)).

Recognizing this change in the law, the United States Court of Appeals for the Fourth Circuit in *Swift v. Bolten,* 517 F.2d 368 (4th Cir., 1975) overruled *Ballwanz, supra,* and stated at page 370:

> "The longshoreman and the stevedore now have a common interest in the maintenance of the third-party action and both stand to gain from it. If the action is brought by the longshoreman, the stevedore can sustain no liability and it will secure a definite pecuniary advantage, if the action is successful. Provided that pecuniary advantage is secured through the services of counsel employed by the longshoreman, the stevedore should be taxed with that part of a reasonable fee for the longshoreman's counsel as is proportioned to its share of the recovery. This is the rule that has been adopted in similar instances and that accords with settled equitable principles."
>
> • • •
>
> "Accordingly, the longshoreman was entitled to have an apportionment of his attorney's fees between him and the stevedore or its insurance carrier in proportion to their share in the recovery had. After all, had the longshoreman not filed the action, the insurance carrier would have been forced to file an action to recover of the shipowner for its payments and would have incurred attorney's fees payable out of its recovery. It suffers no injury if it is forced, as we hold, to bear its proportionate share of the attorney's fees when the longshoreman files the action and makes full recovery on its behalf."

Vito Valentino, a longshoreman, recovered less in his law suit against the shipowner than he had received in compensation benefits. District Judge Jack B. Weinstein in *Valentino v. Rickners Rhederei G.M.B.H.* etc. 417 F. Supp. 176, (EDNY

1976), in a thorough opinion discussed the effect of the 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act and various possible recoveries by longshoremen in their third-party actions, from less than the compensation lien to substantially greater than the compensation lien. He came to the conclusion that "(178) In short, the same rule of proportional sharing would apply to attorneys' fees in longshoremen's suits no matter what the recovery."

The United States Court of Appeals for the Second Circuit affirmed at 552 F.2d 466. During the course of its opinion, the Court stated at pages 468, 469:

> "The statute is silent on the distribution of the recovery in a suit brought by a longshoreman himself. We are thus required to formulate a rule that complements the statutory scheme. *See Cella v. Partenreederei MS Ravenna,* 529 F.2d 15, 20 (1st Cir. 1975), *cert. denied,* 425 U.S. 975, 96 S.Ct. 2175, 48 L.Ed.2d 799 (1976).
>
> It is a well-established principle of equity that a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts. *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); *Chouest v. A & P Boat Rentals, Inc.,* 472 F.2d 1026 (5th Cir.) (Wisdom, J.), *cert. denied,* 412 U.S. 949, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973)."
>
> * * *
>
> "McGrath responds that for six months after the injury, the longshoreman alone has the statutory right to sue, and the employer can do nothing. 33 U.S.C. §933(b). It argues that it could bring suit with less expensive counsel, and might pursue a different trial strategy. Neither ground supports reversal.
>
> The stevedore should not realize a windfall simply because its employee has chosen to exercise a right granted by Congress In the six-month provision of 33 U.S.C. §933(b), Congress has made a deliberate choice to allow the longshoreman alone to proceed with the suit. Thus, control of the lawsuit and choice of counsel are given to him for six molnths. The fact that he has taken up this option gives no additional rights to the employer. Moreover, if Valentino's action here did create any rights for McGrath, it would be the right to question the amount of the fee, and not to question the payment of a fee at all. Here, it is conceded that the amount of the fee is reasonable.
>
> At oral argument, both parties stated that stevedores do not, as a practical matter, pursue these lawsuits—presumably for fear of antagonizing their customers. To deny attorneys a fee in these circumstances would surely discourage counsel from pressing longshoremen's claims on a contingent fee basis in all cases, save those where a recovery subtantially in excess of the amount of the stevedore's lien is a virtual certainty. Thus, appellant asks us to sacrifice the actual rights of longshoremen and their lawyers to the theoretical possibility that they might elect to press such claims at some time in the future. We refuse to do this."

The Court, in *Valentino,* then went on to note the changes in the law wrought by the 1972 Amendments and stated at page 470:

> "With the abolition of the 'warranty of workmanlike performance' and its accompanying right to indemnity, this conflict of interest was eliminated. The Fourth Circuit, in response to this, held that *Ballwanz* was no longer applicable. *Swift v. Bolten,* 517 F.2d 368, 369-70 (4th Cir. 1975). The same rationale requires us to disapprove such cases as *Russo* and *Spano,* and reach the same conclusion as the Fourth Circuit. In doing so, we do not disturb *Fontana's* holding *on the allocation of the attorney's fee from the award.*
>
> [4] There is thus no reason to deny an attorney's fee in this case. The equitable rule of *Sprague v. Ticonic Nat'l Bank, supra,* requires it. Charging the fund with the expense of recovering it is in keeping with the statutory scheme. Finally, with the abolition of the *Ryan* action in 1972, there is no longer a conflict of interest between stevedore and longshoreman calling for a contrary result." (Emphasis supplied)

The Court cited the case of *Fontana v. Pennsylvania R.R.,* 106 F. Supp. 461 (SDNY 1952), aff'd sub nom. *Fontana v. Grace Line, Inc.,* 205 F.2d 151 (2d Cir.), cert. denied, 346 U.S. 886, 74 S.Ct. 137, 98 L.Ed. 390 (1953), which held — (1) the expense of securing the recovery from the shipowner, that is, the longshoreman's attorney's fees and costs, is the first charge against the fund itself and (2) this expense should be borne en-

tirely by the longshoreman, without any sharing by the lien holder. The reasoning was that the manner of distribution of the recovery should be the same whether the action was brought by the longshoreman or his employer (33 U.S.C. 933(e)). As indicated in the quotation noted above, the Second Circuit opinion in *Valentino, supra,* carefully affirmed only the first portion of the *Fontana* holding, i.e. ". . . on the allocation of the attorney's fee from the award." If the Court intended to affirm the *Fontana* holding in its entirety it could simply have said "In doing so we do not disturb Fontana's holding," and need not have included the italicized material.

The Decision of the Court Below

In its decision in the instant case, however, the Second Circuit followed both aspects of the *Fontana* holding, despite the fact that *Fontana* was a pre-1972 Amendment case (A.11).

The Second Circuit also based it decision partly on the case of *Cella v. Partenreederei MS Ravenna,* 529 F.2d 15 (1st Cir. 1975) cert. denied, 425 U.S. 975, 96 S.Ct. 2175 (1976), which is the leading case holding that the employer contribute nothing towards the expenses of obtaining the recovery "in order to husband its resources and its insurance carrier's resources, for payment of the increased benefits under the Act." (A.12,13).

The Equities and Analysis

To compel the longshoreman to pay the entire attorney's fee and litigation expense when a portion of the recovery inures to the benefit of the compensation lien holder is unfair and inequitable. *Sprague v. Ticonic National Bank, et al.,* 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

This inequity was not only recognized by the Courts which ruled in favor of proportional sharing of attorneys' fees but by the First Circuit in it decision in *Cella, supra,* wherein the Court stated at page 20:

> "Were we to follow the fourth circuit and hold that the normal dictates of equity control the allocation of attorney's fees in this case, we might be more disposed to find that it would be appropriate to award fees out of that portion of the settlement that goes to reimburse Cella's employer."

The Court, however, concluded that the "normal dictates of equity" did not control. The opinion continued at pages 20, 21:

> "But this case arises in the context of the Longshoremen's and Harbor Workers' Compensation Act."
>
> * * *
>
> "The 1972 amendments described above were enacted as a compromise between shipowners and stevedore-employers in order to provide increased statutory compensation payments. For years the scale of compensation payments had been insufficient. Elimination of the unseaworthiness cause of action against the shipowner, and the indemnity action against the stevedore was necessary to ensure adequate funds for the increased benefits. In particular, the drain on the employer's resources by the attorney's fees and expenses required to litigate the third party indemnity actions was cited as an obstacle to funding adequate compensation payments. H.Rep. No. 92-1441, 92d Cong., 2d Sess. in 3 U.S. Code Cong. & Admin. News, pp. 4698, 4702 (1972) S. Rep. No. 92-1125, 92d Cong. 2d Sess. 9 (1972). We conclude that the overriding purpose of the 1972 amendments was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act.
>
> [3-5] An award of attorney's fees out of that portion of a third party tort settlement which goes to reimburse the employer or its carrier would contravene this fundamental purpose. It would cause a reduction in the amounts which the employer can legitimately call upon to fund its obligation towards injured workmen under the Act."

Prior to the 1972 Amendments it no doubt cost the stevedores money in attorneys fees to litigate indemnity actions, but this was the proverbial "drop in the bucket" compared to the amounts they were paying in judgments and settlements in these actions. The stevedore was required not only to reimburse

the shipowner for the amount it was required to pay the longshoreman, but the shipowner's legal fees and expenses as well. *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673 (3rd Cir. 1964), cert. denied 382 U.S. 812, 86 S.Ct. 23, 15 L.Ed. 2d 60. It was the elimination of the entire indemnity action, of which the stevedore's own litigation costs and attorney's fees were a small part, which was the trade-off for increased compensation payments.

The basis for the *Cella* holding was carefully analyzed and found "incomplete" by the United States Court of Appeals for the Fifth Circuit in the case of *Mitchell v. Scheepvaart Maatschappij Trans-Ocean,* 579 F.2d 1274 (5th Cir. 1978). The Court there stated at pages 1280, 1281:

> "[4] We think this analysis incomplete in at least three respects. First, the surest means of preserving workmen's compensation funds is the encouragement of proper third-party suits based on negligence. A policy of assuring just compensation for attorneys who represent plaintiffs in such actions should serve as an important safeguard for the eventual reimbursement of compensation payments made to a longshoreman injured through a third-party's negligence. See *Brown v. American Mail Line, Ltd., supra.*
>
> [5] Second, although the maintenance of adequate benefits is one of the Act's chief concerns, the "overriding purpose" of the LHWCA is the effective protection of injured employees. With respect to employees injured by third-party negligence, that purpose was furthered in 1959 by the elimination of the election of remedies requirement under 33 U.S.C. §933(a). Act of August 18, 1959, P.L. 86-171. That purpose will similarly be furthered by assuring plaintiffs' attorneys just compensation, while protecting the plaintiffs themselves from undue expense in pursuing their damages remedy.
>
> Finally, the formula adopted for the distribution of employers' recoveries in suits under Section 33(e) emphasizes the critical importance, even in employers' suits, of protecting employees' rights in cases of negligence. Section 33(e)(2) permits the employer to retain one-fifth of its net recovery after

> subtracting those expenses permitted under Section 33(e)(1). Although the formula is not explained in the legislative history of the original statute, of which this provision is a part, the Senate Committee on Labor and Public Welfare, in reporting on the 1959 amendments to the Act, said:
>
> > . . . by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interest of the employee as much as possible.
>
> S.Rep.No. 428, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. Code Cong. & Admin. News, pp. 2134,2135. Implicit in this interpretation are the twin goals of employee protection through the preservation of compensation funds and employee protection through appropriate recoveries from tortfeasors. Our holding that employers or their carriers may be required to contribute to a reasonable attorney's fee represents a proper balancing of these two kinds of employee protection."

See also, *Brown v. American Mail Line, Ltd.*, 437 F.Supp. 628, which ruled in favor of proportional sharing of attorney's fees and criticized the holding in *Cella, supra.*

The Second Circuit also relied for its decision in the instant case on the argument made in *Fontana, supra,* that pursuant to 33 U.S.C. §933 (d) and (e) when the action is brought by the employer against the shipowner and a recovery is made, the employer retains from the proceeds of the recovery the expenses incurred in bringing the action against the shipowner, including attorney's fees and the full amount of the lien and that, similarly, the employer should receive the full amount of the lien without deduction of attorney's fees when the employee brings the action (A.11, 12). The circumstances, however, are as a practical matter, not the same.

If the employer brings the action, he must pay an attorney and risk the loss of the attorney's fee if the case is lost or the recovery small. He subjects himself to discovery proceedings and all of the other inconveniences which must be suffered by an active litigant. He may become liable to a judgment for costs. If the employer assumes these liabilities and responsibilities, he is entitled to the benefits of the statutory distribution set forth at 33 U.S.C. §933(e).

When the longshoreman brings the action, however, the employer gets a completely free ride. He is not a litigant, incurs no costs or liability for indemnity (33 U.S.C. §905) and, pursuant to the decision of the Court of Appeals, stands to recoup the full lien at the complete expense of the longshoreman.

The holding by the Fifth Circuit in the *Mitchell* case, *supra,* that a determination be made on an individual case basis by the District Judge as to whether or not the employer should share in the costs of obtaining the recovery is certainly more equitable than a complete denial of any sharing.

It is respectfully suggested, however, that except in those circumstances where the attorney for the employer participates in the litigation along with the attorney for the longshoreman and contributes legal services which aid in achieving the recovery, or the longshoreman's attorney charges a fee in excess of the fees customarily charged, a hearing in each case is burdensome and unnecessary.

The compensation lien is not a debt owed by the longshoreman to the stevedore. The only person owing the debt to the employer is the shipowner whose negligence caused the longshoreman's accident and thus caused the employer to make compensation payments. Therefore, when the longshoreman obtains counsel and secures payment of the debt for the employer, the employer should bear the expenses of his own recovery. Whether the total recovery from the shipowner is greater or less than the lien or large or small is immaterial. *Sprague v. Ticonic National Bank et al., supra.*

CONCLUSION

The judgment of the Circuit Court should be reversed with instructions to the circuit court to direct that plaintiff's motion for summary judgment on the intervenor's action be granted, and an order entered directing that the lien of liberty Mutual Insurance Company for workmen's compensation benefits be fixed in an amount so that it will bear proportionately with petitioner the costs of obtaining petitioner's recovery from the shipowner, including petitioner's attorney's fees.

Respectfully submitted,

ALAN C. RASSNER
15 Park Row
New York, N.Y. 10038
(212) 227-2618
Counsel of Record for Petitioner

SHAFTER & SHAFTER
Attorneys for Petitioner

RASSNER, RASSNER & OLMAN
Of Counsel for Petitioner

APPENDIX

RELEVANT DOCKET ENTRIES

March 28, 1974	Filed complaint and issued summons.
June 14, 1974	Filed Defendant's answer.
July 21, 1977	Filed [motion by] Liberty Mutual to intervene as a plaintiff and affidavit in support of, returnable 8/3/77, 10:00 AM, Room 1904.
August 9, 1977	Filed affidavit of A. Rassner by plaintiff re: in connection with the motion by Liberty granting leave to intervene.
August 17, 1977	Filed memo endorsed on entry docketed 7/21/77; re: motion (to intervene) granted. TENNEY J. m/n.
September 28, 1977	Filed Notice of Motion by plaintiff re: an order pursuant to FRCP 56 that Liberty's lien be paid to plaintiff, returnable 10/11/77.
March 28, 1978	Filed MEMORANDUM No. 47026 — Summary Judgment is denied to the plaintiff, and award instead to the intervenor Liberty Mutual Ins. Co. as subrogee of the stevedore Connecticut Terminal Co. Attorney's fees to be awarded first from the sum recovered by plaintiff, upon settlement with the defendant, and the intervenor is to be reimbursed in full for the compensation

lien it holds pursuant to 33 USC Sec. 933 (h). Settle Judgment on Notice. So Ordered: Tenney, J. mn/.

April 14, 1978 — Filed JUDGMENT WITH NOTICE OF SETTLEMENT — that summary judgment be denied to the plaintiff and awarded to the intervenor Liberty Mutual and that attorney's fees are to be awarded first from the sum recovered by plaintiff upon settlement with the defendant and the intervenor is to be reimbursed in full for the compensation lien it holds pur. to 33 U.S.C. Sec. 933 (h). So Ordered. Tenney, J. JUDGMENT ENTERED: CLERK m/n

April 28, 1978 — Filed plaintiff's Notice of Appeal from that portion of the judgment which denied plaintiff's motion for summary judgment, etc. and grants summary judgment to the intervenor Liberty, that intervenor be reimbursed in full for the compensation lien it holds. Copies mailed to: Semel, McLaughlin & Boeckmann, & Kirlin, Campbell & Keating.

January 29, 1979 — Filed true copy of mandate of USCA—the order of said District Court is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant. A. Daniel Fusaro, Clerk. Judgment entered 01/29/79. Raymond F. Burghardt, Clerk. No bill of costs or statement attached.